

## **2011 DRAFTING REQUEST**

### **Bill**

Received: **01/14/2011**

Received By: **tkuczens**

Wanted: **As time permits**

Companion to LRB:

For: **Jeffrey Mursau (608) 266-3780**

By/Representing: **Tim Gary**

May Contact:

Drafter: **tkuczens**

Subject: **Administrative Law**

Addl. Drafters:

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Mursau@legis.wisconsin.gov**

Carbon copy (CC:) to: **tracy.kuczenski@legis.wisconsin.gov**

---

### **Pre Topic:**

No specific pre topic given

---

### **Topic:**

awarding costs in administrative agency actions

---

### **Instructions:**

See attached

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### **Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	tkuczens 01/21/2011	kfollett 02/04/2011		_____			State
/1	tkuczens 08/12/2011	kfollett 08/15/2011	jfrantze 02/04/2011	_____	lparisi 02/04/2011	lparisi 07/06/2011	State
/2			phenry 08/16/2011	_____	lparisi 08/16/2011	lparisi 08/16/2011	

FE Sent For:

*atintus*  
*8/19*

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/?	tkuczens 01/21/2011	kfollett 02/04/2011					State
/1		12/15 8/15	jfrantze 02/04/2011	PH/MS	lparisi 02/04/2011	lparisi 07/06/2011	

FE Sent For:

<END>

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/1			jfrantze 02/04/2011	_____	lparisi 02/04/2011		

FE Sent For:

<END>

**2011 DRAFTING REQUEST**

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Wanted: **As time permits**

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For: **Jeffrey Mursau (608) 266-3780**

By/Representing: **Tim Gary**

May Contact:

Drafter: **tkuczens**

Subject: **Administrative Law**

Addl. Drafters: **gmalaise**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Mursau@legis.wisconsin.gov**

Carbon copy (CC:) to: **tracy.kuczenski@legis.wisconsin.gov**

---

**Pre Topic:**

No specific pre topic given

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**Topic:**

awarding costs in administrative agency actions

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See attached

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/?	tkuczens	1/15/11 2/4	J 2/4	2/4 ph/mb			

FE Sent For:

<END>

## Kuczenski, Tracy

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**From:** LRB.Legal  
**Sent:** Friday, January 14, 2011 1:57 PM  
**To:** Hurley, Peggy; Kuczenski, Tracy  
**Subject:** FW: Message from LRB website ... Drafting request

---

**From:** Rep.Mursau  
**Sent:** Friday, January 14, 2011 1:54 PM  
**To:** LRB.Legal  
**Subject:** Message from LRB website

Can you please redraft 2007 Assembly 372 for Rep. Jeff Mursau?

Thank you in advance,  
Tim Gary  
Research Assistant to  
Rep. Jeff Mursau

## Kuczenski, Tracy

---

**From:** Malaise, Gordon  
**Sent:** Monday, January 24, 2011 3:33 PM  
**To:** Hurley, Peggy; Kuczenski, Tracy  
**Cc:** Gary, Tim  
**Subject:** RE: Message from LRB website ... Drafting request

Tracy and Peggy:

I just spoke to Tim from Rep. Mursau's office. In response to Robert's drafter's note from last time, Rep. Mursau's office spoke to DOJ about repealing ss. 227.485 (1) and 814. 245 (1), which require those sections to be interpreted in light of federal case law as of November 20, 1985, and DOJ said to go ahead and repeal those subsections.

Gordon

---

**From:** Hurley, Peggy  
**Sent:** Friday, January 14, 2011 3:33 PM  
**To:** Kuczenski, Tracy; Malaise, Gordon  
**Subject:** RE: Message from LRB website ... Drafting request

Well, that resolves it for me! Thanks, Tracy!

---

**From:** Kuczenski, Tracy  
**Sent:** Friday, January 14, 2011 3:30 PM  
**To:** Malaise, Gordon; Hurley, Peggy  
**Subject:** RE: Message from LRB website ... Drafting request

I'll take it, Peggy, and I'll enter it but won't get started on it until next week.

Tracy K. Kuczenski  
*Legislative Attorney*  
Wisconsin Legislative Reference Bureau  
tracy.kuczenski@legis.wisconsin.gov  
(608) 266-9867

---

**From:** Malaise, Gordon  
**Sent:** Friday, January 14, 2011 3:06 PM  
**To:** Hurley, Peggy; Kuczenski, Tracy  
**Subject:** RE: Message from LRB website ... Drafting request

It looks pretty simple and straightforward--parallel provisions for courts and administrative proceedings.

I'm under the gun at moment drafting a rush administrative law draft, so if you want to get it started and do your bit then pass it on to me I can get to it next week.

Or if it can wait until Tuesday I can enter it, do my bit, then pass it on to you.

---

**From:** Hurley, Peggy  
**Sent:** Friday, January 14, 2011 3:00 PM  
**To:** Kuczenski, Tracy; Malaise, Gordon  
**Subject:** RE: Message from LRB website ... Drafting request

LRB 07-0008

I think this may be Gordon's (or at least mostly Gordon's). Please let me know if you think different.

I'm certainly willing to redraft it if either of you are too busy or otherwise want to pass on it.

Pwf

2011

2007 ASSEMBLY BILL 372

1/21/11

May 29, 2007 - Introduced by Representatives FRISKE, VOS, BIES, GUNDERSON, MURSAU, JESKEWITZ, ALBERS, HAHN, MUSSER and TOWNSEND, cosponsored by Senators SCHULTZ, GROTHMAN, LEIBHAM and DARLING. Referred to Committee on Judiciary and Ethics.

Regen

- 1 AN ACT *to repeal* 227.485 (2) (b), (c) and (d), 227.485 (7), 814.245 (2) (a), (b) and
- 2 (c) and 814.245 (8); and *to amend* 106.20 (1) (f), 227.485 (3), 227.485 (6) and
- 3 814.245 (3) of the statutes; **relating to:** awarding costs in administrative
- 4 agency actions.

*Analysis by the Legislative Reference Bureau*

Under current law, if an individual, small nonprofit corporation, or a small business is the prevailing party in an administrative agency contested case, in an action brought by an agency, or in a judicial review proceeding under s. 227.485 (6), that prevailing party is entitled to an award of costs unless the court finds the agency was substantially justified in taking its position or if such an award would be unjust under the circumstances. If the prevailing party is an individual, that party is not entitled to recover costs if the party's federal adjusted gross income was \$150,000 or more in each of the three years prior to the commencement of the action.

This bill eliminates financial and entity size limitations for prevailing parties to be eligible to receive costs in administrative agency actions, allowing an award of costs to all persons who are prevailing parties unless the court finds the agency was substantially justified in taking its position or if such an award would be unjust under the circumstances.

Insert analysis A

Insert analysis B

**ASSEMBLY BILL 372**

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

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*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

✓  
1        **SECTION 1.** 106.20 (1) (f) of the statutes is amended to read:

2        106.20 (1) (f) “Small business” ~~has the meaning given in s. 227.485 (2) (c)~~ <sup>✓</sup> means  
3        a business entity, including its affiliates, which is independently owned and  
4        operated, and which employs 25 or fewer full-time employees or which has gross  
5        annual sales of less than \$5,000,000.

*Insert 2-6*  
6        **SECTION 2.** 227.485 (2) (b), (c) and (d) of the statutes are repealed.

✓  
7        **SECTION 3.** 227.485 (3) of the statutes is amended to read:

8        227.485 (3) In any contested case in which ~~an individual, a small nonprofit~~ <sup>✓</sup>  
9        ~~corporation or a small business~~ <sup>✓</sup> a person other than the state is the prevailing party  
10       and submits a motion for costs under this section, the hearing examiner shall award  
11       the prevailing party the costs incurred in connection with the contested case, unless  
12       the hearing examiner finds that the state agency which is the losing party was  
13       substantially justified in taking its position or that special circumstances exist that  
14       would make the award unjust.

✓  
15       **SECTION 4.** 227.485 (6) of the statutes is amended to read:

16       227.485 (6) A final decision under sub. (5) is subject to judicial review under  
17       s. 227.52. If the ~~individual, small nonprofit corporation or small business~~ <sup>✓</sup> a person <sup>✓</sup>  
18       other than the state is the prevailing party in the proceeding for judicial review, the  
19       court shall make the findings applicable under s. 814.245 and, if appropriate, award  
20       costs related to that proceeding under s. 814.245, regardless of who petitions for



**2011-2012 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-1062/?ins  
TKK:.....

1       **Insert analysis A**

no # Current law also requires hearing examiners and courts in this state to be guided by federal case law as of November 20, 1985, when interpreting these provisions governing costs to prevailing parties.

2       **Insert analysis B**

no # This bill also eliminates the requirement that hearing examiners and courts rely on federal case law as of November 20, 1985, when interpreting these provisions governing costs to prevailing parties.

3       **Insert 2-6**

4       **SECTION 1.** 227.485 (1) of the statutes is repealed. ✓

5       **Insert 3-4**

6       **SECTION 2.** 814.245 (1) of the statutes is repealed. ✓

**ASSEMBLY BILL 372**

judicial review. In addition, the court on review may modify the order for payment of costs in the final decision under sub. (5).

**SECTION 5.** 227.485 (7) of the statutes is repealed.

**SECTION 6.** 814.245 (2) (a), (b) and (c) of the statutes are repealed.

**SECTION 7.** 814.245 (3) of the statutes is amended to read:

814.245 (3) Except as provided in s. 814.25, if ~~an individual, a small nonprofit corporation or a small business~~ a person other than the state is the prevailing party in any action by a state agency or in any proceeding for judicial review under s. 227.485 (6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

**SECTION 8.** 814.245 (8) of the statutes is repealed.

**SECTION 9. Initial applicability.**

(1) The treatment of sections 106.20 (1) (f), 227.485 (3), 227.485 (6), and 814.245 (3) of the statutes and the repeal of sections 227.485 (2) (b), (c), and (d), 227.485 (7) and 814.245 (2) (a), (b), and (c), and 814.245 (8) of the statutes first applies to administrative agency contested cases, actions by a state agency, and judicial review proceedings under s. 227.485 (6), commenced on the effective date of this subsection.

**SECTION 10. Effective date.**

(1) This act takes effect on the first day of the 4th month beginning after publication.

(END)

**Parisi, Lori**

---

**From:** Gary, Tim

**Sent:** Tuesday, July 05, 2011 4:24 PM

**To:** LRB.Legal

**Subject:** Draft Review: LRB 11-1062/1 Topic: awarding costs in administrative agency actions

Please Jacket LRB 11-1062/1 for the ASSEMBLY.

7/5/2011

**Barman, Mike**

---

**From:** Gary, Tim

**Sent:** Thursday, July 28, 2011 11:10 AM

**To:** LRB.Legal

**Subject:** Draft Review: LRB 11-1062/1 Topic: awarding costs in administrative agency actions

Please Jacket LRB 11-1062/1 for the ASSEMBLY.

7/28/2011

## Barman, Mike

---

**From:** Gary, Tim  
**Sent:** Thursday, July 28, 2011 11:41 AM  
**To:** Barman, Mike  
**Subject:** RE: Draft Review: LRB 11-1062/1 Topic: awarding costs in administrative agency actions  
I have it. Sorry. Thank you.

### Tim Gary

Wisconsin State Assembly  
Office of **Representative Jeff Mursau**  
36th Assembly District, Research Assistant  
**Committee on Natural Resources**, Clerk  
**Committee on Forestry**, Clerk  
PO Box 8952  
Madison, WI 53708-8953  
(608) 266-3780  
[Sign Up for E-Updates](#)

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**From:** Barman, Mike  
**Sent:** Thursday, July 28, 2011 11:29 AM  
**To:** Gary, Tim  
**Subject:** RE: Draft Review: LRB 11-1062/1 Topic: awarding costs in administrative agency actions

Our records show that this draft was jacketed on July 6th ... please let us know if you are unable to locate the bill jacket.

Thanks,

**Mike Barman** (Lead Program Assistant)

State of Wisconsin - Legislative Reference Bureau

Legal Section - Front Office

1 East Main Street, Suite 200, Madison, WI 53703

(608) 266-3561 / [mike.barman@legis.wisconsin.gov](mailto:mike.barman@legis.wisconsin.gov)

---

**From:** Gary, Tim  
**Sent:** Thursday, July 28, 2011 11:10 AM  
**To:** LRB.Legal  
**Subject:** Draft Review: LRB 11-1062/1 Topic: awarding costs in administrative agency actions

Please Jacket LRB 11-1062/1 for the ASSEMBLY.

7/29/2011

## Kuczenski, Tracy

---

**From:** Gary, Tim  
**Sent:** Thursday, August 11, 2011 10:33 AM  
**To:** Kuczenski, Tracy  
**Cc:** Burri, Lance  
**Subject:** RE: Wied Trust case

Tracy,

Sen. Grothman and Rep. Mursau would like to amend their lrb drafts to include trusts as being eligible to recover legal fees.

I am sending LRB 1062 back to you for a /2 via page.

Thank you for your work on this.

### **Tim Gary**

Wisconsin State Assembly  
Office of **Representative Jeff Mursau**  
36th Assembly District, Research Assistant  
**Committee on Natural Resources**, Clerk  
**Committee on Forestry**, Clerk  
PO Box 8952  
Madison, WI 53708-8953  
(608) 266-3780  
[Sign Up for E-Updates](#)

---

**From:** Kuczenski, Tracy  
**Sent:** Friday, July 29, 2011 10:10 AM  
**To:** Gary, Tim  
**Subject:** RE: Wied Trust case

Hi Tim –

As I read the statutes, I don't believe a trust would be eligible to recover costs under either current law ss. 227.485 (3) and 814.245 (3) or under those sections as amended by 2011 LRB 1062/1.

Current law provides that "an individual, a small nonprofit corporation or a small business" that is a prevailing party may receive costs in any action by a state agency or in any proceeding for judicial review under certain circumstances.

Small business is defined under current law as a business entity, including its affiliates, which is independently owned and operated, and which employs 25 or fewer full-time employees or which has gross annual sales of less than \$5,000,000." Although "business entity" is not defined, it would not seem that the trust in the Wied Trust case attached to your email would qualify as a "small business" for purposes of recovery of costs.

Small nonprofit corporation is defined by current law to mean a nonprofit corporation which employs fewer than 25 full-time employees. Nonprofit corporation is defined under current law to

mean "a corporation that does not make distributions, except as authorized under s. 181.1302 (1), (2) and (3)." A corporation is defined under current law as a nonstick corporation subject to the provisions of chapter 181. Trusts, on the other hand, are governed by chapter 701. Further, there are a number of sections of the Wisconsin Statutes in which trusts, including charitable trusts, are identified as a legal entity or organization and trusts are always identified separately from corporations. See, for example, ss. 19.42 (11), 23.0955 (1), and 29.89 (1), stats.

Under ss. 227.485 (3) and 814.245 (3), stats., as amended by 2011 LRB 1062/1, the phrase "an individual, a small nonprofit corporation or a small business" is replaced by "a person other than the state." Person is not defined in either chapter 227 or chapter 814. However, person is defined under s. 990.01 (26), stats., (for purposes of construction of laws; words and phrases) to include "all partnerships, associations and bodies politic or corporate." Trusts are not explicitly included in this definition of "person". A trust is a legally distinct entity separate from and different than a corporation, partnership, or association.

If it is your intent to include trusts in ss. 227.485 (3) and 814.245 (3) for purposes of cost recovery, I would recommend that the draft explicitly define person to include trusts. See, for example, the definition of "person" under ss. 30.40 (9) and 54.950 (11), stats.; both of these sections define person to mean, among other things, a natural person (or individual), a corporation, an association, a partnership, an estate, or a trust.

Let me know if you have any other questions or if Representative Mursau would like to make any changes to this bill.

Tracy

Tracy K. Kuczenski  
*Legislative Attorney*  
 Wisconsin Legislative Reference Bureau  
 tracy.kuczenski@legis.wisconsin.gov  
 (608) 266-9867

---

**From:** Gary, Tim  
**Sent:** Tuesday, July 12, 2011 3:35 PM  
**To:** Kuczenski, Tracy  
**Subject:** FW: Wied Trust case

LRB 1062

Under the bill you drafted for Rep. Mursau, would a trust be eligible to petition for a legal fee recovery under the circumstances laid out in the attached court case? On the second to last page, it makes reference to a frivolous argument being made by the DNR.

Feel free to share with others if you feel it is necessary in order to provide me a clear answer.

**Tim Gary**  
 Wisconsin State Assembly  
 Office of **Representative Jeff Mursau**  
 36th Assembly District, Research Assistant

**Committee on Natural Resources, Clerk**  
**Committee on Forestry, Clerk**  
PO Box 8952  
Madison, WI 53708-8953  
(608) 266-3780  
[Sign Up for E-Updates](#)

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**From:** Bruce, Cory  
**Sent:** Wednesday, July 06, 2011 3:02 PM  
**To:** Gary, Tim  
**Subject:** FW: Wied Trust case

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**From:** Henneger, Richard W - DNR [mailto:Richard.Henneger@Wisconsin.gov]  
**Sent:** Wednesday, July 06, 2011 2:50 PM  
**To:** Bruce, Cory  
**Subject:** FW: Wied Trust case

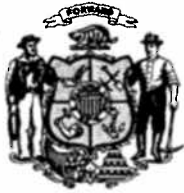
---

**From:** Strasbaugh, Kathleen J - DNR  
**Sent:** Wednesday, July 06, 2011 01:17 PM  
**To:** Henneger, Richard W - DNR  
**Subject:** Wied Trust case

 **Kathleen Strasbaugh**  
Staff Attorney, Bureau of Legal Services  
Wisconsin Department of Natural Resources  
P.O. Box 7921  
Madison, WI 53707-7921  
(t) phone: (608) 266-0911  
(t) fax: (608) 266-6983  
(+) e-mail: [kathleen.strasbaugh@wisconsin.gov](mailto:kathleen.strasbaugh@wisconsin.gov)

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State of Wisconsin  
2011 - 2012 LEGISLATURE



2

LRB-10624

TKK:kjf:jf

RMN R

2011 BILL

in 8/12/11

wanted soon

Regen

- 1 AN ACT *to repeal* 227.485 (1), 227.485 (2) (b), (c) and (d), 227.485 (7), 814.245 (1),  
2 814.245 (2) (a), (b) and (c) and 814.245 (8); and *to amend* 106.20 (1) (f), 227.485  
3 (3), 227.485 (6) and 814.245 (3) of the statutes; **relating to:** awarding costs in  
4 administrative agency actions.

*Analysis by the Legislative Reference Bureau*

Under current law, if an individual, small nonprofit corporation, or a small business is the prevailing party in an administrative agency contested case, in an action brought by an agency, or in a judicial review proceeding under s. 227.485 (6), that prevailing party is entitled to an award of costs unless the court finds the agency was substantially justified in taking its position or if such an award would be unjust under the circumstances. If the prevailing party is an individual, that party is not entitled to recover costs if the party's federal adjusted gross income was \$150,000 or more in each of the three years prior to the commencement of the action. Current law also requires hearing examiners and courts in this state to be guided by federal case law as of November 20, 1985, when interpreting these provisions governing costs to prevailing parties.

This bill eliminates financial and entity size limitations for prevailing parties to be eligible to receive costs in administrative agency actions, allowing an award of costs to all persons who are prevailing parties unless the court finds the agency was substantially justified in taking its position or if such an award would be unjust under the circumstances. This bill also eliminates the requirement that hearing

any trust or  
person, other  
than the state,  
that is a

party

**BILL**

examiners and courts rely on federal case law as of November 20, 1985, when interpreting these provisions governing costs to prevailing parties.

For further information see the **state** fiscal estimate, which will be printed as an appendix to this bill.

---

***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           **SECTION 1.** 106.20 (1) (f) of the statutes is amended to read:

2           106.20 (1) (f) "Small business" ~~has the meaning given in s. 227.485 (2) (e)~~ means  
3           a business entity, including its affiliates, which is independently owned and  
4           operated, and which employs 25 or fewer full-time employees or which has gross  
5           annual sales of less than \$5,000,000.

6           **SECTION 2.** 227.485 (1) of the statutes is repealed.

7           **SECTION 3.** 227.485 (2) (b), (c) and (d) of the statutes are repealed.

8           **SECTION 4.** 227.485 (3) of the statutes is amended to read:

9           227.485 (3) In any contested case in which ~~an individual, a small nonprofit~~  
10          ~~corporation or a small business~~ <sup>trust or a</sup> a person other than the state is the prevailing party  
11          and submits a motion for costs under this section, the hearing examiner shall award  
12          the prevailing party the costs incurred in connection with the contested case, unless  
13          the hearing examiner finds that the state agency which is the losing party was  
14          substantially justified in taking its position or that special circumstances exist that  
15          would make the award unjust.

16          **SECTION 5.** 227.485 (6) of the statutes is amended to read:

17          227.485 (6) A final decision under sub. (5) is subject to judicial review <sup>under</sup>  
18          s. 227.52. If the ~~individual, small nonprofit corporation or small business~~ <sup>trust or a</sup> a person  
19          other than the state is the prevailing party in the proceeding for judicial review, the  
20          court shall make the findings applicable under s. 814.245 and, if appropriate, award

**BILL**

costs related to that proceeding under s. 814.245, regardless of who petitions for judicial review. In addition, the court on review may modify the order for payment of costs in the final decision under sub. (5).

**SECTION 6.** 227.485 (7) of the statutes is repealed.

**SECTION 7.** 814.245 (1) of the statutes is repealed.

**SECTION 8.** 814.245 (2) (a), (b) and (c) of the statutes are repealed.

**SECTION 9.** 814.245 (3) of the statutes is amended to read:

814.245 (3) Except as provided in s. 814.25, if ~~an individual, a small nonprofit corporation or a small business~~ <sup>trust or a</sup> person other than the state is the prevailing party in any action by a state agency or in any proceeding for judicial review under s. 227.485 (6) and submits a motion for costs under this section, the court shall award costs to the prevailing party, unless the court finds that the state agency was substantially justified in taking its position or that special circumstances exist that would make the award unjust.

**SECTION 10.** 814.245 (8) of the statutes is repealed.

**SECTION 11. Initial applicability.**

(1) The treatment of sections 106.20 (1) (f), 227.485 (1), (3), and (6), and 814.245 (3) of the statutes and the repeal of sections 227.485 (2) (b), (c), and (d), and (7) and 814.245 (1), (2) (a), (b), and (c), and (8) of the statutes first applies to administrative agency contested cases, actions by a state agency, and judicial review proceedings under s. 227.485 (6), commenced on the effective date of this subsection.

**SECTION 12. Effective date.**

(1) This act takes effect on the first day of the 4th month beginning after publication.

(END)